118-19

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 188.

HORACE S. JOHNSTON, PLAINTIFF IN ERROR,

vs.

THE DISTRICT OF COLUMBIA.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED JANUARY 27, 1883.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 188.

HORACE S. JOHNSTON, PLAINTIFF IN ERROR,

vs.

THE DISTRICT OF COLUMBIA.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

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1 *Declaration. Filed November 2nd, 1877.*

In the Supreme Court of the District of Columbia. November 2d, 1877.

HORACE S. JOHNSTON, Pl'ff,
vs.
THE DISTRICT OF COLUMBIA, Def't. } At Law. No. 18655.

The plaintiff sues the defendant for that the plaintiff is lawfully possessed, and has been for a long time, to wit, for the space of ten years, of lot numbered two (2) in Reservation A, in the city of Washington, in the District of Columbia, fronting on Missouri avenue, upon which there is a three-story brick building, in which the plaintiff and his family reside.

And the plaintiff says that he is also lawfully possessed of lot No. 21, and also lots No. 40, 41, 42, 43, and 44, subdivision, in reservation B, fronting on Four-and-a-half (4½) street, in said city; that upon said lots 21, 40, 41, 42, 43, and 44 are erected two-story brick houses, severally with shallow basements, which are let and rented from time to time to tenants, and which have been in former years
2 yielding an adequate rent.

And the plaintiff says that, being so lawfully possessed of the said several lots of land and the buildings thereon, and being a taxpayer thereon and liable to all assessments made or that may be made by, and all taxes that have accrued or may lawfully accrue thereon to the said District of Columbia, he, the said plaintiff, ought to be secured and protected in the use and enjoyment of the said property by the said District from interruption in the use and enjoyment thereof, and from damages caused by its, the said District's, works of every kind and nature, and especially from overflows of water from sewers and conduits erected and continued by the said District.

And the plaintiff says that the sewer constructed and made by the said District on said Missouri avenue, and passing in front of said lot No. 2, in said reservation A, is so defective as to the purposes for which it was intended, and so imperfect in carrying off the water that flows therein at any heavy fall of rain, and is
3 continued so by the said District, that upon any and every heavy fall of rain the said sewer fills and overflows and floods the said Missouri avenue and adjoining grounds, and fills the lower part of the said house on said Missouri avenue, and fills the basements of the said houses on 4½ street to the depth of several feet, and will continue so to do whilst it, the said sewer, remains as it now is.

And the plaintiff says that on the 26th day of July, A. D. 1877, the lower story of the said house on Missouri avenue was flooded with water, coming from the said sewer along said avenue, and the basements stories of the said houses on 4½ street were filled with water from the said sewer for a long time, to wit, for the space of six hours, to a great depth, to wit, the depth of three feet; and that on the 29th day of July, in the year last aforesaid, from the same cause, to wit, the water from the said sewer, the said lower story of the said

house on Missouri avenue was flooded, and the basements of said houses on 4½ street were filled with water from said sewer for a long time, to wit, for the space of eight hours, to a great depth, to wit, to the depth of three feet; and that on the night of the sixth of August, in the year last aforesaid, from the same cause aforesaid, the lower story of the said house on Missouri avenue and the basements of the said houses on 4½ street were flooded with water for a long time, to wit, for the space of eight hours, to a great depth, to wit, one foot in the former, and three feet in the latter; and that on the fourth day of October, in the year last aforesaid, from and by the same cause aforesaid, the lower story of the said house on Missouri avenue was flooded to a great depth, to wit, the depth of two feet, and the basements of the said houses on 4½ street were filled to a great depth, to wit, the depth of four feet, and the water therein remained a long time, to wit, for the space of ten hours.

4

And the plaintiff says that at each and every flooding and overflowing from said Missouri avenue sewer, as aforesaid, foul and unwholesome deposits are left upon the respective premises, brought from other parts of the said city, by which the families residing in the said houses are greatly annoyed and put to trouble and expense.

5

And the plaintiff says that the frequent and repeated overflows of said sewer as aforesaid by any and every heavy fall of rain have rendered the said lower story of the said house on Missouri avenue and the said basement stories of the said houses on 4½ street useless; have injured and impaired the foundations and walls of the same, and lessened the value of the said houses and reduced the rental income of the said houses on 4½ street one-half of what it formerly was; have so affected the said houses by dampness as to be deleterious to the health of the occupants, and caused the plaintiff to expend large sums of money from time to time to cleanse and repair the said houses to keep them habitable, to wit, the sum of one thousand dollars, and have rendered the said houses unsaleable; and the plaintiff says he is injured, and that the said District of Columbia is responsible to him for his losses and injuries, and he claims damages in the sum of twenty thousand dollars.

6

JOHN E. NORRIS,
Att'y for Plaintiff.

The defendant is to plead hereto on or before the first special term of the court occurring twenty days after service hereof; otherwise judgment.

JOHN E. NORRIS,
Attorney for Plaintiff.

Summons. Issued November 2d, 1877.

In the Supreme Court of the District of Columbia.

HORACE S. JOHNSTON, Pl'ff,
vs.
THE DISTRICT OF COLUMBIA, Def't. } At Law. No. 18655.

The President of the United States to the defendant, Greeting:

You are hereby commanded to appear in this court, on the first day of its special term, occurring 20 days after service of this writ on you, to answer the plaintiff's suit, and show why he should
7 not have judgment against you for the cause of action stated in his declaration.

Witness: D. K. CARTTER,
Chief Justice.

[Seal of Court.]

R. J. MEIGS, *Clerk.*
By J. R. YOUNG, *Ass't Cl'k.*

NOTE.—The special term of the court commences on the first Tuesday of every month except August, in which month there is no term of the court.

On back.

Served copies of the declaration, notice to plead, and this summons on the defendant by acknowledgment of service by A. G. Riddle, att'y for D. C., the 2nd day of November, 1877.

F. DOUGLASS, *Marshal.*

Defendant's Plea. Filed November 28th, 1877.

In the Supreme Court of the District of Columbia.

HORACE S. JOHNSTON
vs.
THE DISTRICT OF COLUMBIA. } At Law. No. 18655.

8 The District of Columbia, by its attorneys, for plea to the said declaration, says that the defendant is not guilty of the grievances above laid to its charge in manner and form as the plaintiff hath above thereof complained against it.

RIDDLE, MILLER & PADGETT,
Att'ys for District of Columbia,

Amended Declaration. Filed December 10th, 1880.

In the Supreme Court of the District of Columbia.

HORACE S. JOHNSTON
vs.
DISTRICT OF COLUMBIA. } At Law. No. 18655.

And now comes the plaintiff, and, by leave of the court, amends his declaration herein by adding the following and additional count

And whereas also the said plaintiff being possessed of his said dwelling-houses, with their appurtenances as aforesaid, the said defendant began and at the time of the said committing of said
9 grievances hereinafter mentioned laid and caused to be laid in front and near to the premises of said plaintiff and on said avenue a certain sewer on a plan which was adopted by the defendant, and was unreasonable, defective, and insufficient, and of inadequate capacity to carry off the water, filth, and excrement which it was intended so to do, and which, besides, was well known to be so, and in disregard of common sense and knowledge, and also defendant was before the adoption and during its construction so informed and well knew it to be imperfect, insufficient, and stupid; and while well knowing that the plan was such as aforesaid described proceeded to build and construct the same in an imperfect and stupid manner as respects the grading, outlets, and materials used therein, and its junction with the public sewer on Third street, and also the Tiber sewer, as well as otherwise. And plaintiff further says that after the laying of said sewer so imperfectly and stupidly planned and constructed as aforesaid, the said defendant heretofore, to wit, on the 29th day of July, 1877, and divers
10 other days subsequent thereto, to wit, on the 6th day of August and on the 4th of October, in the said year, in the city and District aforesaid, failed to inspect said sewer, and after due notice of the condition of said sewer knowingly, wrongfully, and unjustly suffered and permitted said sewer to choke up with filth, excrement, and other refuse stuff and water, causing thereby large quantities of excrement, filth, and water to raise from and out of said sewer onto and into the premises of said plaintiff to a great depth, to wit, to the depth of two feet, and to stay, remain, and continue therein during all the time last aforesaid, and also thereby divers noisome, noxious, and offensive and unwholesome smells, vapors, and stenches during the time aforesaid ascended and came onto and into the said houses of said plaintiff, and during said times greatly annoyed, injured, and discommoded said plaintiff, and the said plaintiff hath by reason thereof been hindered and prevented from the enjoyment and use of said premises and the appur-
11 tenances thereto belonging, and the said plaintiff hath thereby been deprived of divers great gains and profits, as he, the said plaintiff, before the committing of said grievances, had been used and accustomed thereto, and would have continued so to do; all of which the said defendant well knew, but refused to correct said sewer so constructed as aforesaid, and cause the same to be inspected and remove from said sewer the excrement, filth, and obstructions therein as aforesaid; whereupon the said plaintiff saith he is injured and hath sustained damages to the amount of $20,000.00, and thereupon he brings this suit.

JOHN E. NORRIS,
Att'y for Plaintiff.

Pleas to Amended Declaration. Filed December 10th, 1880.

In the Supreme Court of the District of Columbia.

12 HORACE S. JOHNSTON
vs.
THE DISTRICT OF COLUMBIA. } At Law. No. 18655.

The District of Columbia, by its attorney, for pleas to the said declaration, as amended, says that—

1. That the defendant is not guilty of the grievances above laid to its charge in manner and form as the plaintiff hath above thereof complained against it in the second count.

2. And, for a further plea, the defendant says that the alleged cause of action set forth in the plaintiff's second count, the amendment to his declaration, did not accrue within one year before the filing of said amended declaration in this case.

2. And, for a further plea, the defendant says that the alleged cause of action set forth in the plaintiff's second count, the amendment to his declaration, did not accrue within three (3) years before the filing of said amended declaration in this case.

A. G. RIDDLE,
Att'y for Def't.

13 *Demurrer. Filed December 10th, 1880.*

In the Supreme Court of the District of Columbia.

H. S. JOHNSTON
vs.
DISTRICT OF COLUMBIA. } At Law. No. 18655.

And the plaintiff says that the said 1st plea of the statute of limitations is bad in substance, and that the 2d plea of the statute of limitations is bad in substance.

NORRIS & COOK,
Att'ys for Plaintiff.

Matters of Law to be Argued.

1st. That the amendment to the declaration relates back to the original declaration.

2d. That there is no statute of limitations as to one or three years in this class of actions.

NORRIS & COOK,
Attorneys for Plaintiff.

14 *Joinder of Issue. Filed December 10th,* 1880.

In the Supreme Court of the District of Columbia.

H. S. JOHNSTON
vs.
DISTRICT OF COLUMBIA. } At Law. No. 18655.

And the plaintiff joins issue on the defendant's plea to his amended declaration.

NORRIS & COOK,
For Plaintiff.

Joinder of Issue. Filed December 10*th,* 1880.

In the Supreme Court of the District of Columbia, the eighth day of December, 1877.

HORACE S. JOHNSTON, Pl'ff,
vs.
THE DISTRICT OF COLUMBIA, Def't. } At Law. No. 18655.

The plaintiff joins issue on the defendant's plea.

JOHN E. NORRIS,
Att'y for Plaintiff.

15 To Messrs. Riddle, Miller & Padgett, attorney- for defendant.

Note of Issue. Filed December 12*th,* 1877.

In the Supreme Court of the District of Columbia, the December day of twelfth, 1877.

HORACE S. JOHNSTON, Pl'ff,
vs.
DISTRICT OF COLUMBIA, Def't. } At Law. No. 18655.

John E. Norris, att'y.
Riddle, Miller & Padgett, att'ys.

The last pleading in this cause was filed on the 10th day of December, 1877.

JOHN E. NORRIS,
Att'y for Plaintiff.

To the clerk.

Proceedings before the supreme court of the District of Columbia, holding a special term at law, division No. 2, commencing on the 18th day, being the third Monday of October, 1880.

Present presiding: Alexander B. Hagner, associate justice of said supreme court.

16 WEDNESDAY, *December* 8, 1880.

Session resumed pursuant to adjournment; Hagner, justice, presiding.

HORACE S. JOHNSTON, Pl'ff,
vs.
THE DISTRICT OF COLUMBIA, Def't. } At Law. No. 18655. Cal. 124.

Now comes here as well the plaintiff, by his attorney, Mr. Morris, as the defendant by its attorney, Mr. Miller, and a jury of good and lawful men of this District, to wit: Frederick A. Van Fagan, George Ferguson, William H. Gray, John A. Keem, Joseph R. Washington, Robert H. Bontz, Chauncy F. Greer, James Wortham, John S. Goss, William H. Rollins, William F. Jones, and Thomas A. Lazenby, who being duly sworn to try the issue above joined, after a part hearing of the case, are respited until the meeting of the court to-morrow.

THURSDAY, *December* 9, 1880.

Session resumed pursuant to adjournment; Hagner, justice, presiding.

17 HORACE S. JOHNSTON, Pl'ff,
vs.
THE DISTRICT OF COLUMBIA, Def't. } At Law. No. 18655. Cal. 124.

Now, again come here the the parties aforesaid, in manner aforesaid, and the same jury that was respited yesterday, and thereupon, on motion of the plaintiff, leave is granted him to amend his declaration, and the same is amended; and said jury, after a further hearing of the case, are again respited until the meeting of the court to-morrow.

FRIDAY, *December* 10, 1880.

Session resumed pursuant to adjournment; Hagner, justice, presiding.

HORACE S. JOHNSTON, Pl'ff,
vs.
THE DISTRICT OF COLUMBIA, Def't. } At Law. No. 18655. Cal. 124.

Now, again come here the parties aforesaid, in manner aforesaid, and the same jury that was respited, whereupon the defendant files three pleas to plaintiff's amended declaration: 1st, general issue; 2d, statute of limitations of one year; 3rd, statute of limita-
18 tions of three years; to which plaintiff joins issue to first plea, and demurs to second and third pleas, and defendant joins issue on said demur—, and the same having been heard said demurreis *is* sustained as to defendant's second plea, and overruled as to third plea; whereupon after hearing the evidence in the case said jury on their oath say they find the issues above joined in favor of the defendant. Therefore, it is considered that this plaintiff take nothing by his suit, and that the defendant go thereof without day, and recover against the plaintiff the costs of its defence, taxed at $ —, and have execution thereof.

TUESDAY, *January* 18, 1881.

Session resumed pursuant to adjournment.
Hagner, justice, presiding.

HORACE S. JOHNSTON, Pl'ff,
vs.
THE DISTRICT OF COLUMBIA, Def't. } At Law. No. 18655.

Now, again comes here the plaintiff, by his said attorney, and tenders to the court here his bills of exceptions to the rulings of the court on the trial of this case, and prays that they may be
19 duly signed, sealed, and made a part of the record, which is done accordingly.

Bill of Exceptions. Filed January 18th, 1881.

In the Supreme Court of the District of Columbia.

HORACE S. JOHNSTON
vs.
DISTRICT OF COLUMBIA. } At Law. No. 18655.

Bill of exceptions of the plaintiff taken at the trial of the above-entitled cause:

At the trial of this cause the plaintiff, to prove the issue joined on his behalf, offered the evidence of the plaintiff, which was heard by the court and jury, and, in substance, was as follows, viz:

That his house on Missouri avenue was built by him twenty years ago, and that he lived there with his family; that the floods and overflows mentioned occurred at the times stated, namely, in the summer of 1877; that the building is a three-story brick, and
20 the lower floor and entry were overflown by foul water from the sewer on Missouri avenue at these different overflows, and was injured in the brick, plastering, and papering, and that he had expended from $500 to $1,000 in repairing damages; that the basements of said houses on 4½ street by the same overflowings of said sewer were filled and the walls injured and the wood rotted, and that he expended $400 or $500 in repairs in consequence of these floods; that he noticed that the water in the said avenue was very deep; that he never saw or knew of any flooding or overflow of said avenue or said property until the said avenue sewer was constructed; that his rents were lessened by the floods in the 4½ street property.

And to sustain further the issues joined the plaintiff put upon the stand as his witness, Benjamin Severson, a citizen of Washington, and an engineer by profession, who testified to the Tiber sewer being two feet lower at its base than the Missouri avenue sewer where they meet each other, and being asked by the counsel for the
21 plaintiff what, in his opinion, the consequence would be in case of a freshet or great fall of rain, the question was objected to by the counsel of the defendant, unless the counsel for the plaintiff stated his object in asking such question, and thereupon it appeared that it was asked with the view of showing by that witness

that the plan on which the sewer had been constructed by the authorities of the District had not been judiciously selected, and thereupon the testimony was objected to, and the court, after argument, sustained the objection, to which ruling the plaintiff's counsel excepted, and asked this his first exception be signed by court, which is done accordingly now for them this 18th day of January, 1881.

A. B. HAGNER, [SEAL.]
Ass'e Justice.

And thereupon the plaintiff's attorneys asked to amend his declaration, which was allowed, and the plaintiff added a second count, viz:

And now comes the plaintiff and by leave of court amends his declaration herein by adding the following and additional
22 count, and he says, that being possessed of the said dwelling houses aforesaid, the defendant laid out, and caused to be laid out, in, from, out of, and near to the premises of the plaintiff and on said avenue a certain sewer on a plan which was adopted by the defendant, and which was unreasonable, insufficient, and of inadequate capacity to carry off the water, filth, and excrement, which it was intended to do so; that the defendant well knew the defect of the said sewer, and in disregard of common sense and knowledge, and that the said sewer in the adoption of the plan and its construction was imperfect, insufficient, and stupid in respect to its grading, outlets, &c., and also its position with the public sewer from Third street, and also the Tiber sewer. The plaintiff says that after the laying of said sewer so imperfectly and stupidly planned and constructed as aforesaid the said defendant thereupon, to wit, on the 29th day of July, 1877, and on divers other days subsequent thereto, to wit, on the 6th day of August and on the 4th day of Octo-
23 ber, in the said year, in the city of Washington and the District of Columbia aforesaid, failed to inspect said sewer, and, after due notice of the condition of said sewer, knowingly and wrongfully suffered and permitted said sewer to choke up with filth, excrement, and other refuse stuff and water, causing thereby large quantities of excrement, filth, and water to raise from and out of said sewer unto and into the said premises of the plaintiff to a great depth, to wit, to the depth of four feet, and to stay, remain, and continue therein all the time last aforesaid, and thereby divers noxious and offensive and unwholesome smells, vapors, and stenches during the times aforesaid ascended and came unto and into the said houses of the plaintiff, and during the said times greatly annoyed, injured, and discommoded the plaintiff; and the plaintiff says that by reason thereof he has been hindered and prevented from the enjoyment and use of the said premises, and the appurtenances thereunto belonging, and has been thereby deprived of divers great gains and profits,
24 as he, the said plaintiff, before the committing of said grievances, had been and was accustomed and would have continued to, enjoy; all of which the defendant well knew, but neglected to correct the said sewer so constructed as aforesaid, and cause the same to be in-

spected, and remove from said sewer the excrement, filth, and obstructions therein as aforesaid; whereupon the plaintiff saith that he is injured and hath sustained damages to the amount of $20,000, which was filed, and the defendant, by its attorney, entered the following pleas:

1st. That the defendant is not guilty of the grievances above laid to its charge in manner and form as the plaintiff hath above thereof complained against it in the second count.

And the plaintiff joins issue on the defendant's pleas to his amended declaration.

2nd. And for a further plea the defendant says that the alleged cause of action set forth in the plaintiff's second count, the amendment to his declaration, did not accrue within one year before
25 the filing of said amended declaration in this cause.

3rd. And for a further plea the defendant says that the alleged cause of action set forth in the plaintiff's second count, the amendment to his declaration, did not accrue within three (3) years before the filing of said amended declaration in this cause.

Demurrer 1. And the plaintiff's attorneys say that the said first plea of the statute of limitations is bad in substance.

And the defendant joins issue upon the first demurrer of the plaintiff to the amended declaration herein filed, and the court sustained the said demurrer.

Demurrer 2. And the defendant joins issue on the plaintiff's second demurrer to the statute of limitations, and the court overruled the same; to which ruling the plaintiff's attorneys excepted, and asked the court to sign this his second exception.

Which is accordingly done this 18th day of January, 1881, now for then.

A. B. HAGNER, [SEAL.]
Associate Justice.

26 And the plaintiff's attorneys again offered the said evidence of the said Benjamin Severson, as hereinbefore stated, and the same was rejected *to* by the court; to the rejection of which the plaintiff's attorneys excepted, and asked that this his 3rd exception be signed, which is accordingly done, now for then, this 18th day of January, 1881.

A. B. HAGNER, [SEAL.]
Associate Justice.

Proceedings before the supreme court of the District of Columbia, beginning on the fourth Monday of January, 1882, in pursuance of the order of the court of the 19th of December, 1881.

Present: Chief Justice Cartter and Justices Hagner and James.

MONDAY, *March* 13, 1882.

Session resumed, pursuant to adjournment.

Present: Chief Justice Cartter and Justices Cox and James.

27 HORACE S. JOHNSTON, Appellant,
vs.
THE DISTRICT OF COLUMBIA, Def't. } At Law. No. 18655.

Argued by Mr. Cook for the plaintiff; to be resumed to-morrow.

TUESDAY, *March* 12, 1882.

Session resumed, pursuant to adjournment.
Present: Chief Justice Cartter and Justices Cox and James.

HORACE S. JOHNSTON, Pl'ff,
vs.
THE DISTRICT OF COLUMBIA, Def't. } At Law. No. 18655.

Argued by Mr. Cook for plaintiff, in reply to Miller, & submitted.

MONDAY, *March* 27, 1882.

Session resumed, pursuant to adjournment.
Present: Chief Justice Cartter and Justice Cox, Justice James being absent—being indisposed.

HORACE S. JOHNSTON, Pl'ff,
vs.
THE DISTRICT OF COLUMBIA, Def't. } At Law. No. 18655. Cal. 13.

28 Now come here as well the plaintiff as the defendant, by their respective attorneys, and thereupon, because it appears to the court here that there is no error either in the record and proceedings or in the judgment of the special term, therefore it is considered that the said judgment be, and the same is hereby, affirmed, with costs; and the case is remanded to the special term, that the defendant may have execution of its said recovery.

29 In the Supreme Court of the District of Columbia, the 3rd day of January, 1883.

HORACE JOHNSTON
vs.
THE DISTRICT OF COLUMBIA. } No. 18655. In Error.

Know all men by these presents that we, Horace Johnston and E. Jackson, are bound unto the above-named District of Columbia in the sum of two hundred and fifty dollars, to be paid to the said District of Columbia; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals, and dated this 3rd day of January, 1883.

Whereas the above-named Horace Johnston has prosecuted his writ of error to the Supreme Court of the United States to reverse the judgments rendered in the above suit by the said supreme court of the District of Columbia:

Now, therefore, the condition of this obligation is that if the above-named Horace Johnston shall prosecute his said writ of error to effect, and answer all damages and costs if he shall fail to make good his

plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

H. S. JOHNSTON. [SEAL.]
E. JACKSON. [SEAL.]

Sealed and delivered in presence of—

—— ——.

Approved Jan'y 8th, 1883.
MACARTHUR, *Justice.*

30 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the chief justice and justices of the supreme court of the District of Columbia, Greeting:

Because in the record and proceedings as also in the rendition of a judgment in a plea which is in the said court before you, between Horace S. Johnson, *is* plaintiff, and The District of Columbia, *is* defendant, No. 18655, at law, a manifest error hath happened, to the great damage of the said plaintiff, as by his complaint appears, and it being fit that the error, if any hath happened, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, therefore you are hereby commanded, if judgment be therein given, under your seal, distinctly and openly, to send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the United States, this eighth day of January, in the year of our Lord 1883, and of the Independence of the United States the ——.

[Seal Supreme Court of the District of Columbia.]

R. J. MEIGS, *Clerk.*

DISTRICT OF COLUMBIA, *to wit:*

To The District of Columbia:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the District of Columbia, wherein Horace S. Johnson is plaintiff and you are defendant, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, so that speedy justice be done the parties in that behalf.

Witness David K. Cartter, chief justice of the said supreme court of the District of Columbia.

D. K. CARTTER,
Ch'f Just.

Service accepted, this 9th day of January, A. D. 1883.

RIDDLE,
Att'y D. C.

31 AUTHENTICATION OF RECORD.

Clerk's Certificate.

CLERK'S OFFICE,
SUPREME COURT OF THE DISTRICT OF COLUMBIA.

I, Return J. Meigs, clerk of the said court, do hereby certify that the writings annexed to this certificate are true copies of originals on file and of record in said office, and that said originals together constitute the record of the proceedings of said court in this cause.

Witness my hand and the seal of said court, this 17th day of January, 1883.

[Seal Supreme Court of the District of Columbia.]

R. J. MEIGS, *Clerk*,
By J. JAY CAMP,
Assistant Clerk.

Justice's Certificate.

I, David K. Cartter, chief justice of said court, do certify the foregoing attestation by Return J. Meigs, clerk of the said court, to be in due form.

Witness my hand and seal, this 17th day of January, 1883.

D. K. CARTTER, [SEAL.]
Chief Justice.

Clerk's Certificate to Justice's Official Character.

I, Return J. Meigs, clerk of said court, hereby certify that David K. Cartter, whose genuine signature is subscribed to the foregoing certificate, was at the time of signing and attesting the same chief justice of said court, duly commissioned and qualified.

Witness my hand and the seal of said court, this 17th day of January, 1883.

[Seal Supreme Court of the District of Columbia.]

R. J. MEIGS, *Clerk*,
By J. JAY CAMP,
Assistant Clerk.

Endorsed on cover: Dist. of Col. supreme court. No. 188. Horace S. Johnston, plaintiff in error, *vs.* The District of Columbia. Filed 27th January, 1883.

118-19

RECEIVED
MAR 16 1886
JAMES H. McKENNEY
CLERK

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 188.

HORACE S. JOHNSTON
vs.
THE DISTRICT OF COLUMBIA.
} Law. No. 18,655.

Brief for Plaintiff in Error.

This is a writ of error to the Supreme Court of the District of Columbia.

The action in this case was instituted to recover damages for an injury caused to the houses of the plaintiff by the construction of a sewer by the defendant in front of the premises of the plaintiff, known as the Missouri Avenue sewer; it having been constructed, as the plaintiff claims, in such an unskilful manner, and so defective as to the purposes for which it was intended, and so imperfect in carrying off the water that flows therein, that upon any and every of all rain the said sewer fills and overflows and floods the premises of the plaintiff with foul water and filth to the depth of several feet.

On the trial the plaintiff offered evidence tending to show that he had built one of his said houses over twenty years

ago, and that he lived there with his family, and that there had never been any flooding of his said houses till said sewer had been constructed as aforesaid. That after said sewer had been laid and in the summer of 1877, the said sewer overflowed at different times, and flooded his premises with filth and foul water, and caused the walls of his house to crack and the plastering to fall and other serious injury did to his premises, and further to sustain the issues on his part. The plaintiff offered in evidence the testimony of one Benjamin Severson, an engineer, tending to prove that the Tiber Sewer into which said Missouri Avenue sewer emptied was two feet lower than the said Missouri Avenue sewer. And further, to maintain his issues, the said Severson was asked what, in his opinion, would be the consequenc if a freshet or heavy fall of rain, on account of its being two feet lower than the Tiber sewer; counsel for defendant objected unless the object was stated, whereupon the evidences offered was stated to be for the purposes of showing that the plan of the sewer as constructed was not judiciously selected, thereupon counsel for defendant objected, and the objection was sustained by the court.

Upon the rejection of this testimony the first exception is taken.

And thereupon plaintiff asked leave to amend his declaration, which was granted, and the amendment made, and thereupon defendant pleaded not guilty, and the statute of limitations. Issue was joined upon the plea of not guilty, and a demurrer interposed as to the plea of limitations, which demurrer was overruled, and thereupon plaintiff again offered the evidence of said Benjamin Severson, as before stated, which was repealed by the Court, and thereupon by the rulings of the Court a verdict was rendered by the jury for the defendant. The pleadings just above referred to were all made at the trial table.

Assignment of Errors.

1. The Court erred in rejecting the question. what in his opinion would be the consequence in case of a freshet or great fall of rain, asked of the witness, Benjamin Severson.

2. The Court erred in overruling the demurrer to the plea of the statute of limitations.

3. The Court erred in rejecting the said evidence of Benjamin Severson offered after the issue joined upon the amended declaration.

Argument and Authorities.

The principal question in this case is, whether or not a municipality is responsible to one of its citizens and a taxpayer for injuries done his property, by laying in front of it a sewer so defective, as to its plan and construction, being so planned and constructed in accordance therewith, as to overflow and throw upon the property of its said citizen large quantities of filth and foul water upon any and every heavy fall of rain. This question has been presented in its different phases before almost all the courrs in this country, and the decisions are almost universal, that a municipality is responsible for damages growing out of the failure of the municipality to keep in proper repair its sewers or drains.

The question of responsibility seems, and in the light of authority it may be said, does depend upon whether the injury resulted from an act of the municipality that was judicial or ministerial, if the municipality in the construction of its sewers is acting judicially or quasi-judicially, then no liability attaches; but if, on the other hand, it is acting ministerially, then it is liable in a civil action for the damages resulting to individuals by its neglect to perform the duty, or for the want of proper care or want of skill of its officers or servants in performing it.

Dillon on Municipal Corporations, Vol. 2, § 778, and the authorities there cited.

In constructing drains, sewers and gutters, a municipality or its officers are acting, not in a judicial or quasi-judicial, but in a ministerial capacity.

Dillon on Municipal Corporations, Vol. 2, page 937;
Barton vs. *Syracuse*, 36 N. Y., 54;
The City of Evansville vs. *Decker*, 84 Ind., 325.

In the case at bar, the plaintiff had never been disturbed or injured by freshets or rains, until the defendant laid its sewer along in front of his premises, then he began to suffer the injuries consequent upon its overflows. If the sewer had not been laid as it was, it is to be presumed he would have continued in the use and enjoyment of his property undisturbed by overflows of water.

Whether the defendant should lay a sewer or not in front of plaintiff's premises, may be held to be a matter of discretion, and in determining that question, its officers may be said to be acting judicially, but having determined to lay one, their actions as to the plan thereof, and its construction in accordance therewith, are ministerial.

The City of Evansville vs. *Decker*, 84 Ind., 325;
City of Dixon vs. *Eli B. Baker*, 65 Ill., 518;
Weiss vs. *The City of Madison*, 75 Ind., 241;
Ashley vs. *The City of Port Huron*, 35 Mich., 296;
Cooley on Torts, 580;
Cummins vs. *City of Seymour*, 79 Ind., 491.

The skill and care which is incumbent, relates as well to the capacity of the sewer as to the mechanism in its construction, as well to its plan, as to its execution.

City of Indianapolis vs. *Huffer*, 30 Ind., 235;
Logansport vs. *Wright*, 25 Ind., 512;
The Rochester White Lead Co. vs. *Rochester*, 3 Comstock, 463, 95th N. Y., 435.

This question was elaborately dicussed in the case of *Weiss* vs. *The City of Madison*, 75 Ind., 241.

And the Court, in determing the question, considers the various cases that hold that a municipality is not liable for an injury growing out of a defective plan. At page 252, the very question is treated of at great length, and the Court holds that the municipality is liable, and cites Dillon on municipal corporation, last edition, Vol. 2, sections 1047.

It is therefore submitted that the judgment of the Supreme Court of the District of Columbia should be reversed.

FRANK T. BROWNING,
Counsel for Plaintiff in Error.

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118-19

Supreme Court of the United States.

OCTOBER TERM, 1885.

No. 188.

HORACE S. JOHNSTON, PLAINTIFF,

vs.

THE DISTRICT OF COLUMBIA, DEFENDANT.

Error to the Supreme Court of the District of Columbia.

BRIEF FOR THE DISTRICT.

A. G. RIDDLE,
For the District of Columbia.

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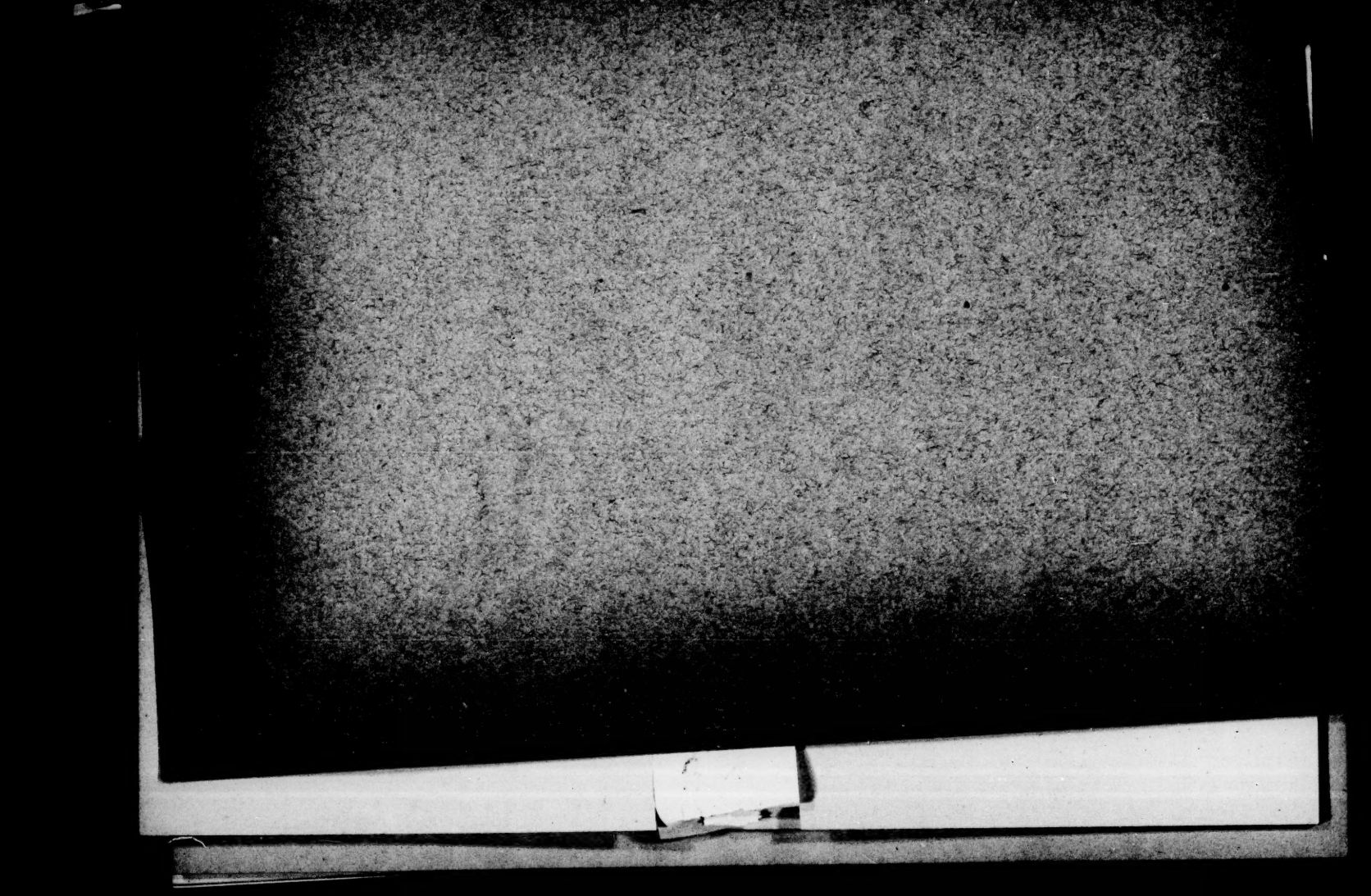

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THE CASE MADE.

The plaintiff, owner of certain houses and lots on Missouri avenue and Four-and-a-half street, in the city of Washington, injured, as he alleges, by flooding the basements through the sewers constructed and maintained by the District during the unprecendented floods of 1877, sues for damages thereto.

See his declaration, pp. 1, 2. Suit commenced November, 1877.

The defendant pleaded the general issue, p. 3. Thus the case stood until October 8th, 1880, when it came on for trial. p. 7. At the trial, after proof of flooding, damages, &c., the plaintiff called an expert and proposed to prove that the in-

jury was in consequence of thefault in the *plan* of the sewerage. The court sustained our objection to this, and plaintiff excepted, pp. 8 and 9. Thereupon, the trial pending, he took leave to amend, and charged the defect in the plans in a new count. This amendment, a new cause of action, appears at p. 3, also p. 9, in his bill of exception. To this count the defendant plead the general issue and the Maryland statute of limitations of one and of three years. The plaintiff demurred to these pleas of the statute. The court sustained the demurrer to the first, and overruled it as to the second, pp. 9 and 10.

The trial then proceeded on the issue made on the plaintiff's second cause of action. The plaintiff again offered his expert, who was again rejected, to which exception was taken and verdict for defendant, pp. 10, 11.

The Questions.

It is thus shown that the plaintiff may present two questions on this record:

1st. Is there a statute of three years' limitation in the District applicable to the plaintiff's second cause of action?

2d. Can a party assail a municipal plan of sewerage, as was attempted in this case?

Both of the points have been repeatedly ruled by the supreme court of the District as held by the justice trying this case, and we had supposed there could be no doubt that both were well ruled.

I. Though names of actions have long been disused here, the plaintiff's is an action on the case.

The act of Maryland (1715, chapter XXIII, section 2), still in force in the District, provides that "actions of account, and *actions upon the case*, upon simple contract, book debt or account, and actions for debt, detenture and replevin for goods and chattels, and actions *quare clansum fregit*"

shall be commenced "*within three years ensuing the cause of said action, and not after.*"

This is certainly conclusive of this question, as I submit.

II. Can the plaintiff assail the plan of sewerage, as he attempted to do?

The doctrine is thus stated by Judge Dillon in his work on Municipal Corporations: "A municipal corporation is not liable to an action in damages, either for the non-exercise of or for the manner in which, in good faith, it exercises its *discretionary* powers of a public or legislative character." § 948 and note citing cases.

Again he says: "Since the duty of providing drainage or sewerage for surface water is in its nature judicial or *quasi* judicial, requiring the exercise of judgment as to the time when and the mode in which it shall be undertaken, the claims of respective localities as to the order of commencement when it cannot all be effected at once, and the best plans which the means at the disposal of the corporation renders it practicable to adopt, it follows upon legal principles that the corporation is not liable to a civil action for wholly failing to provide drainage or sewerage, nor probably for any defect or want of efficiency in the plan of sewerage or drainage adopted, nor according to the prevailing and perhaps correct view, for the insufficient size or want of capacity of gutters or sewers for the purpose intended, particularly if the adjoining property is not in any worse position than if no gutters or sewers whatever had been constructed." § 1046 and notes.

Mills *vs.* Brooklyn, 32 N. Y., 489.
Child *vs.* Boston, 4 Allen, 41.
Wilson *vs.* New York, 1 Denio, 599.
Carr *vs.* Northern Liberties, 35 Penna. St., 324.
Approved by Sharswood, J., in Grant *vs.* Erie, 69 Penna., 422.
Beekman *vs.* Detroit, 34 Mich., 125.
Van Pelt *vs.* Davenport, 42 Iowa, 308.

It is seen, however this second point is ruled, with the second count barred, there was no declaration to which this expert testimony could be applied, and the case must fail.

It is submitted that the judgment must be affimed.

A. G. RIDDLE,
For Defendant.

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MEMORANDA OF ADDITIONAL AUTHORITIES.

Dillon, Mun. Corp., (3d ed.,) secs. 949, 966, 980, 997, 1041, 1043, 1044, 1046–8, 1049, 1050–1.
Roll *vs.* Indianapolis, 52 Ind., 547.
Rozell *vs.* City of Anderson, 91 Ind., 591.
Fair *vs.* Philadelphia, 88 Pa. St., 309.
Foster *vs.* St. Louis, 71 Mo., 157.
Hines *vs.* Lockport, 50 N. Y., 238.
Urquhart *vs.* Ogdensburgh, 91 N. Y., 67; 97 N. Y., 238.
Lansing *vs.* Toolan, 37 Mich., 152.
As to Ashley *vs.* Port Huron, 35 Mich., 296, see also Dill. Mun. Corp., note 1 to sec. 1047 on p. 1074.
Emory *vs.* Lowell, 104 Mass., 13, pp. 15–6.
Merrifield *vs.* Worcester, 110 Mass., 216, p. 221.
Hill *vs.* Boston, 122 Mass., 344, pp. 358–9, 375–6.

HENRY E. DAVIS,
For District of Columbia.